

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANTHONY MANGANIELLO,

Plaintiff,

CIVIL ACTION No.: 07 CV 3644 (HB)

- Against-

THE CITY OF NEW YORK, et. al.

Defendants

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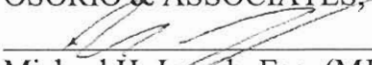
DECLARATION OF COUNSEL

Pursuant to 28 USC §1746, I hereby declare, under penalty of perjury under the laws of the United States of that the following is true and correct.

1. My name is Michael H. Joseph.
2. I am an attorney duly licensed to practice law in the State of New York, and before the United States District Court for the Southern District of New York.
3. I represent the plaintiff in the above captioned matter, as such I am fully familiar with the facts and circumstances of this case.
4. I offer this Declaration in Reply to defendants' opposition to Plaintiff's Counter claim.
5. I attach hereto true copies of the following exhibits:
 - The DD5 concerning Hicks statement is attached as Exhibit 1.
 - The decision of Judge Marcus concerning the evidence at issue here is attached as Exhibit 2.
6. For the reasons more fully stated in the attached Memorandum of Law, the relief sought in Plaintiff's Motion In Limine should be granted.

Dated: White Plains, New York
June 11, 2008

Respectfully submitted,

OSORIO & ASSOCIATES, LLC
BY: 
Michael H. Joseph, Esq. (MJ8838)
184 Martine Avenue
White Plains, New York 10601
(914) 761-3168

COMPLAINT - FOLLOW UP INFORMATIONAL										PAGE _____ OF _____ PAGE	
13-081A (Rev. 4-89)-31										14	
Crime				Pct.		OCCB No.		Complaint No.		Date of This Report	
HOMICIDE				43				2412		02-16-01	
Port		Date Assigned		Case No.		Unit Reporting				Follow-Up No.	
01		02-12-01		624		BRONX HOMICIDE TASK FORCE					
Name - Last, First, M.I.						Victim's Name - If Different					
FORALBERT ACOSTA											
Address, First, M.I.						Address, Include City, State, Zip					
						Apt. No.					
Telephone		Business Telephone		Position / Relationship		Sex		Race		Date of Birth	
										Age	
of		Wanted		Arrested		Weapon		Describe Weapon (If firearm, give color, make, calibre, type, model, etc.)			
Colors						<input type="checkbox"/> Used <input type="checkbox"/> Possessed					
Arrested		Last Name, First, M.I.				Address, Include City, State, Zip				Apt. No.	
<input type="checkbox"/>										Res. Pct.	
Race		Date of Birth		Age		Height		Weight		Eye Color	
						Fl. In.				Hair Color	
										Hair Length	
										Facial Hair	
										NYSID No.	
Sunglasses <input type="checkbox"/>		Clothing Description,									
Name, First Name, Alias		Scars, Marks, M.O., Etc.									
		(Continue In "Details"):									
Arrested		Last Name, First, M.I.				Address, Include City, State, Zip				Apt. No.	
<input type="checkbox"/>										Res. Pct.	
Race		Date of Birth		Age		Height		Weight		Eye Color	
						Fl. In.				Hair Color	
										Hair Length	
										Facial Hair	
										NYSID No.	
Sunglasses <input type="checkbox"/>		Clothing Description,									
Name, First Name, Alias		Scars, Marks, M.O., Etc.									
		(Continue In "Details"):									
IN BOX FOR DETECTIVE/LATENT FINGERPRINT OFFICER ONLY. THIS BOX WILL BE UTILIZED BY INVESTIGATOR WHENEVER POSSIBLE AND MUST BE COMPLETED WHEN USING THIS FORM TO CLOSE A CASE "NO RESULTS."											
Interviewed		In Person		By Phone		Date		Time		Results: Same as Comp. Report - Different (Explain in Details)	
<input type="checkbox"/> No		<input type="checkbox"/>		<input type="checkbox"/>						<input type="checkbox"/> <input type="checkbox"/>	
Interviewed		In Person		By Phone		Date		Time		Results: Same as Comp. Report - Different (Explain in Details)	
<input type="checkbox"/> No		<input type="checkbox"/>		<input type="checkbox"/>						<input type="checkbox"/> <input type="checkbox"/>	
Interviewed						Crime Scene Visited			If Yes - Make Entry in Details Re: Time, Date, Evidence Obtained		
<input type="checkbox"/> No						<input type="checkbox"/> Yes <input type="checkbox"/> No					
Interviewed Photos		Refused		Future		Results:					
<input type="checkbox"/> No		<input type="checkbox"/>		<input type="checkbox"/>							
Interviewed Photos		Refused		Future		Results:					
<input type="checkbox"/> No		<input type="checkbox"/>		<input type="checkbox"/>							
Interviewed		By (Enter Results in Details)				Crime Scene Photos		By (Enter Results in Details)			
<input type="checkbox"/> No						<input type="checkbox"/> Yes <input type="checkbox"/> No					
Case "No Results," Check Appropriate Box and State Justification in Details:											
Operator Referral <input type="checkbox"/> C-2 Inaccurate Facts <input type="checkbox"/> C-3 No Evidence / Can't ID <input type="checkbox"/> C-4 Uncooperative Complainant <input type="checkbox"/> C-5 "Leads" Exhausted											

INVESTIGATION: HOMICIDE
SUBJECT: INTERVIEW OF ERIC HICKS
PARKCHESTER SECURITY OFFICER

On 02/16/01, the undersigned was present with Det Agostini of the 43rd Precinct Detectives at Parkchester Security Office located at 62 Metropolitan Oval, all call office. At this time an interview was conducted with ERIC HICKS, and he relates the following in sum and Substance:

He has worked for Parkchester Security as an SPO for the last 6 years and did work the evening 4X12 tour and he just recently went to work from 6pm to 2am and was off on Monday. But he states he was very good friends with Albert Acosta both on duty and socially off duty. They had just spent last Saturday evening together at a house warming for Albert. He states Albert had been working days w 8X4 for approximately (6) months. He knows AL to be quick tempered. He -1-

d/lr PROCEEDINGS

THE CLERK: Number one on the calendar, case on trial. All party are present with the exception of the jury.

THE COURT: Miss Scaccia, you don't know how you want to proceed at this point. I understand you gave a packet of material to Mr. Richman, you gave a copy of it to me.

MS. SCACCIA: Yeah, I wanted you to see -- I don't know if Mr. Richman, since we left off yesterday when I informed everyone that Sergeant Ohle was going to be one of the witnesses and that he was actually present for an altercation that officer Manganiello and Acosta were involved in. The altercation was between Hicks and Manganiello. Acosta grabbed Manganiello from behind kind of in a bear hug, Hicks continued to hit him. I made inquiry as to whether there were any reports generated by Parkchester regarding defendant's employment record because I did not have any. Counsel said he did not have any. We had some question as to then subpoenaing the defendant's employment record. This morning I had conversations with counsel they said there was nothing in their information that indicated any kind of altercation between Manganiello and Hicks. I had asked Sergeant

d/lr PROCEEDINGS

1 Ohle to bring any reports that did pertain to the
2 incident. He did that. When we broke for lunch he
3 was here with them. I made cops for Miss Hill at
4 the start of our lunch hour and I wanted the Court
5 to know what counsel was given because I think I
6 made it clear yesterday that I had plans to elicit
7 testimony through the sergeant about this prior
8 incident.

9 MR. RICHMAN: Your Honor, not only is
10 this rather remote in time and place but the
11 circumstances don't seem to be directed as
12 against --

13 THE COURT: I'm sorry this is March of
14 '99, right?

15 MR. RICHMAN: Two years before the event.
16 Two years. And the participation of Mr. Acosta even
17 if following what occurred is of such a minimal
18 nature as to not to rise to anything other than
19 more source of confusion for the jury to draw any
20 proper confusion. There's no basis to form any
21 believe that there was bad blood between Acosta and
22 Manganiello certainly not based on these reports.

23 MS. SCACCIA: Your Honor, I'd like to
24 call counsel's attention to the one report that is
25 in Mr. Acosta's hand saying that he refuses to work

d/lr PROCEEDINGS

with the defendant. That was that even predates the incident because he felt that the defendant was a danger to himself and other security officers.

MR. RICHMAN: Which report was that?
What year?

MS. SCACCIA: I believe it was '96.

MR. RICHMAN: 1996. How remote is that,
Your Honor. How far do we go back for that thing?

THE COURT: Well, if I understand this correctly, regardless of what is in here there are a variety of things referred to in the documents you provided me. The immediate question relates to this incident with Officer Hicks.

MS. SCACCIA: Yes.

THE COURT: That is what you intend to
elicit --

MS. SCACCIA: Through this witness, yes.

THE COURT: Through this witness who is
an eyewitness to it?

MS. SCACCIA: Yes.

THE COURT: So let's limit our
discussion to that question.

MR. RICHMAN: Most respectfully submit
and I believe I have and I submit that it's really
too remote, to tangential an event to create

d/lr PROCEEDINGS

something of a nature in which the prosecution can arguably rely upon as being bad blood between the parties. To suggest that to a jury as the basis for a homicide, there's no hostile words, there's no difficult situations. It is apparently the person who one should be angry with would be Hicks, if that were the case. It's two years ago. Tremendous amount of water has passed under the bridge since that time and as such I would most respectfully point out to you that it would be highly inappropriate and improper to allow this to go before a jury as a basis or at least as a motive.

MS. SCACCIA: Your Honor, I think the testimony is relevant in nature. It establishes the type of interaction that these two gentlemen had predating the homicide.

Counsel can make as many arguments as he want about the strength of the People's motive or what his thoughts are as to the view of the People's motive but I think it's become clear that these two people did not get along together and I think one of -- he's saying that he should have been mad at Hicks well it seems to me from the reports and the accounts that I'm getting is that officer Acosta is the one that prevented officer

d/lr PROCEEDINGS

1 Manganiello from even attempt to go fight back but
2 rather he was restraining him while Officer Hicks
3 hits him.

4 Now, he may have feelings as to whether
5 or not that caused the defendant to be angry with
6 Officer Acosta but think it is appropriate and I
7 think it is relevant and I think since this witness
8 is an eyewitness to that event that that testimony
9 should be admissible.

10 MR. RICHMAN: This is pure speculation.
11 Not only is it pure speculation but this witness
12 told the Detective the following: He did not
13 observe any problems between the suspect, and the
14 victim.

15 THE COURT: You're reading from some
16 different report?

17 MR. RICHMAN: Yes, here's a report
18 contemporaneously with the event underlined in
19 yellow.

20 THE COURT: This report is about the
21 incident with Hicks is that what you're saying?

22 MR. RICHMAN: No.

23 THE COURT: No.

24 MR. RICHMAN: That report is a report to
25 the police on the date of the event February 12th.

d/lr PROCEEDINGS

1 THE COURT: This event? Yeah, yeah.

2 MR. RICHMAN: And here we have the
3 officer who purportedly viewed this event and he
4 did not perceive that there was any difficulty
5 between the deceased and Mr. Manganiello and yet he
6 is being asked to testify on the speculations of
7 the part of the prosecution on a motive created
8 entirely out of smoke by the prosecution that this
9 is the basis for the alleged homicide.

10 THE COURT: I do have a concern about
11 the remoteness of this incident. And singling this
12 out as a motive for the crime I'm also concerned
13 because I went back and looked at my notes and I
14 looked at the transcript of the hearing when we
15 talked about both Sandoval and Ventimiglia. You
16 made mention of the Hicks incident then and as I
17 looked at my notes and the transcript, as I recall
18 it was your position at the time that there were
19 things -- you had nothing by way of Ventimiglia
20 other than the purchase of the gun and you had
21 nothing as to Sandoval and you left open the door
22 -- left open the question as to whether should the
23 defendant open the door to incidents like the Hicks
24 incident that you would want to cross examine him
25 about that but not based on simply credibility but

d/lr PROCEEDINGS

1 in response to some testimony that he might give.
2 It would as I said open the door to this kind of
3 cross examination and as I read this report or
4 these reports, it suggests not what I heard from
5 you off the record yesterday, not just what I heard
6 from you off the record yesterday about this being
7 an incident in which Hicks was attacking the
8 defendant but there are accounts -- I'm not sure
9 what the witness you intend to call Ohle would say
10 about this incident but there are descriptions
11 about the incident in this report that make the
12 defendant out to be the aggressor. What would make
13 it more Ventimiglia than just evidence of motive it
14 doesn't establish a bad act or even a criminal act
15 on the defendant's behalf, so I'm troubled by both
16 those grounds by allowing the testimony in now.'
17 Understanding still that if the defendant testifies
18 and gives testimony, you can go in if opens the
19 door to this to this cross examination on this
20 subject. I'm not sure what's changed now that
21 would lead you to make this application.

22 MS. SCACCIA: What changes now is I have
23 Acosta being involved in the Hicks Manganiello
24 incident which until I spoke to Sergeant Ohle
25 yesterday I did not know he was present and if I

d/lr PROCEEDINGS

was to put Officer Hicks on the stand, we'd see what his version -- Officer Hicks has a DD5. According to officer Manganiello Officer Hicks is the aggressor.

THE COURT: Right.

MS. SCACCIA: According to what Sergeant Ohle say is I was present in the locker room. I don't know what precipitated the defendant when I walked in I see Manganiello in a bear hug by Acosta and Hicks is hitting Manganiello, that is not attributing a bad act to the defendant but that is giving some sort of dynamic to the relationship of the deceased and the defendant.

THE COURT: It's three years old.

MS. SCACCIA: I understand.

THE COURT: I think we should go back to where we were.

MS. SCACCIA: Go back to where we were?

THE COURT: To where we were. If the defendant's testimony opens the door to this so be it. But to suggest that an incident three years before establishes a motive with nothing in between that you're offering I think is as Mr. Richman says it's too speculative.

MS. SCACCIA: Then before we bring the